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SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1935

No. 667

THE "ARIZONA," ANTONE MARDESICH AND WIFE, PETER MARDESICH AND WIFE, AND GENERAL CASUALTY CO. OF AMERICA,

Petitioners,

vs.

ANTONIO ANELICH, AS ADMINISTRATRIX OF THE ESTATE OF MARIO ANELICH, DECEASED,

Respondent.

On a Petition for Writ of Certiorari to the Supreme Court of the State of Washington.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The respondent respectfully submits this brief in opposition to the petition for a writ of certiorari to the Supreme Court of the State of Washington:

I.

Opinion of Court Below

The opinion of the court below is dated September 5th, 1935, and is reported as *Anelich v. The Arizona et al.*, 49 Pac. (2d) 3 (R 18-24).

II.

Jurisdiction

The jurisdiction of this Court is invoked under the Jones Act, 46 U. S. C. A., Sec. 688, and Judicial Code, Sec. 237 (b) as amended Feb. 13, 1925.

III.

Statement of the Case

Most of the facts are fairly and accurately stated by the Supreme Court of Washington in the opinion (R 18 to 24). However, because of several inaccuracies in petitioner's statement of the case, and because of their importance upon the questions involved, we feel that the following facts should be stated for a clearer understanding of the case:

The officers and crew of the Arizona were all Slavonians, except the engineer, who was an American, and all except the engineer spoke and used the Slavonian language in the prosecution of their work. The engineer, of course, neither spoke nor understood that language (R 197, 192, 242, 304, 243).

At several places the petitioners assert that the deceased was "an experienced winchman" and this is repeated several times in the brief in connection with the argument on the question of assumption of risk. This is done, no doubt, to convey the idea that Anelich was a "winch-driver" or "winch-operator," as those terms are generally understood. The truth of the matter is that Anelich had nothing whatsoever to do with the operation of the winch or the management of the clutch and controls. He was nothing more nor less than a mere deck hand, whose only duty was to collect and coil the purse line as it was drawn onto the deck by the winch.

There is not a syllable of evidence in the record that Mr. Anelich knew of the worn condition of the clutch, or that he ever at any time had anything to do with the operation of the winch, or that he appreciated the danger, or that he at any time used the forked stick or lock which held the clutch in mesh.

As stated by the lower courts, for the purpose of preventing this clutch from slipping out or becoming disengaged due to its worn condition, the defendants provided and constructed a lock, consisting of a piece of timber about 14 inches long forked at one end to fit over the handle in the elbow or bend thereof, while the other end was held in place by two cleats securely

fastened to the winch timber; one cleat across the timber and one upright forming a square corner in which the end of the stick next to the bit or timber was placed, thus locking the handle in place and holding the clutch in mesh so that it could not slip out or be thrown out without removing the stick. (Pictures, Exs. A and F). There was evidence from which the jury could find that this stick was in place at the time of the accident. (R 107, 85, 237)

When the stick is in place, in order to stop the winch, without shutting off the engine, it is necessary to push the handle forward (toward the bow) about one inch, the thickness of the cleat, so as to free the stick from the square corner, and permit the removal of the forked end from the elbow of the clutch lever. Then the lever must be pushed aft a short distance to disengage the clutch.

It had the same effect as if one would place a grooved block of wood, tightly, under the clutch pedal of an automobile.

At the trial it was respondent's contention that this clutch lever was a safety appliance to be used in an emergency such as existed when Anelich became tangled in the purse line, and that the forked stick, by means of which it was locked in place, entirely destroyed it as a safety appliance; and there was ample

evidence from which the jury could have found this to be true. (R 342, 347, 93, 96, 99, 104, 107)

At the time the deceased became entangled in the line, the purse lines were still pulling in the nets, and there was considerable weight on the winch and lines. (R 198, 313) The statements on page 18 of petitioner's brief that the weight of the net was off of the line and that the engineer was warned by the shouts of Anelich (R 313, 192, 198) are not correct. There was evidence from which the jury could find that the engineer was on deck (R 68, 69, 74, 50, 300, 121) and that the owner was standing within reach of the clutch lever at the time Anelich became entangled in the line (R 86, 49, 85, 46). The jury was also warranted in believing that the owner, who was within reach of the clutch lever, did not use it because it was locked, as aforesaid, and therefore directed the engineer to go blow and stop the engine.

Anelich became injured in the following manner; a part of the purse line which he was collecting and coiling became entangled, and he jumped to one side to attempt to avoid it, but failed, and then his left leg got caught in the line and it began to pull him toward the niggerhead or drum of the winch (R 312). He exclaimed in the Slavonian language—"Oh, Mother of mine, my leg is caught". (R 243, 308). The engineer,

not understanding the cries of the deceased, did not stop the engine until he was ordered to do so by the owner. However, before the engineer could go below and stop the engine Anelich was drawn into the drum of the winch where his leg was mangled and crushed, and the flesh, muscles and arteries were torn from six to eight inches, exposing the fragmented portions of the fibula and tibia (R 153).

In order to release his leg it was necessary to chop the line from the niggerhead with an axe. Although there was a first aid kit aboard the vessel no effort whatsoever was made to use the same with a view to preventing infection (R 273) nor did the defendants attempt to remove his trousers or underwear. All that they did was to remove his boot, place a rope tourniquet around his leg over his clothing, above his knee, to prevent bleeding; they made no examination of his wound to ascertain the extent of his injury, and gave him no first aid treatment of any kind or character. (R 83, 242). If sterile bandages, which were available, had been used any germs other than those which may have entered the wound at the time of the original injury would have been avoided (R 155, 273).

Anelich was thereafter placed in a small skiff by the defendants and was later transferred to the purse seine fishing vessel, "Congress" (R 82). The defen-

dants sent no one from their vessel to look after or secure medical attention for Anelich. From that time on, he was in the care of persons upon whom there was no legal duty to care for him. (R 242).

Concerning the petitioner's negligence in delaying medical treatment of Anelich the statement of the Supreme Court of the State of Washington should be amplified upon as follows:

The XL II., the second boat to which he was transferred, proceeded to Mitchell Bay, a short distance away, where a fish buyer on board, left the boat, which point was approximately 12 miles by road from Friday Harbor where Dr. Sturdevant and an ambulance were located.

The testimony showed that Dr. Sturdevant could have been in attendance upon the deceased within 20 minutes from the time he received a telephone call from Mitchell Bay (R 266), and there was an ambulance subject to call by phone which could have reached the deceased within 25 to 30 minutes (R 266). If the doctor had been called immediately the deceased's wounds would have been treated and the germs therein, if any, in all probability, would have been rendered innoxious (R 157, 266).

Instead of taking the deceased off of the boat at Mitchell Bay, and securing a doctor at the earliest pos-

sible moment, the XL II continued on to Friday Harbor, a distance of about 15 miles from Mitchell Bay, and arrived there at about 10:30 or 11:00 o'clock in the morning, between 2 and 2½ hours after the injury was inflicted.

Dr. Sturdevant was called to the boat and immediately upon arrival cut the dirty trousers and underwear from the wound and put on a temporary dressing, *even though he knew that the man would be taken to his office within a period of ten minutes.* The deceased was then taken to Dr. Sturdevant's office a short distance away and the wound was thereupon redressed and the deceased was given first aid treatment for the first time.

At the time the fish buyer left the boat at Mitchell Bay he called the Fisherman's Packing Company in Everett and asked them to call the Coast Guard, informing them that there was a man at Friday Harbor with a "broken leg," stating nothing about the fact that the man's leg was practically torn off (R 289). The Coast Guard for some reason did not respond to this call, and Dr. Sturdevant, at about 2 o'clock in the afternoon, called them again to which call they responded and the deceased was picked up by the Coast Guard at Friday Harbor at about 5 P. M. that evening, and was taken to Seattle, Washington, where he

was placed in the Marine Hospital at about 10:50 P. M. and given the usual preliminary treatment including tetanus—antitoxin (R 166). From where the deceased was injured, according to the United States Government Chart, it was 9½ miles to Victoria where there was a first class hospital and a doctor (Ex. 4). Even the slowest boat would have taken only about an hour to get to Victoria. An airplane could have been called and the deceased placed in a hospital in Seattle in two hours (R 178).

On the third day after arriving at the Marine Hospital the deceased developed septicemia (blood poisoning) (R 154-156), from which he died on August 8th, 1933, (R 157).

IV.

Summary of Argument
Assumption of Risk

(1) The Courts below committed no error in holding that Anelich did not assume the risk, as a matter of law,

(a) of defective appliances;

(b) of a single unforseen act of negligence on the part of the owner, in failing to stop the winch. for the reason that these were not ORDINARY risks of the employment, but were EXTRA-ORDINARY risks and are not assumed by a seaman under the gen-

eral Maritime law as amplified by the Jones Act.

(2) The Trial Court did not err in withdrawing from the jury the defense of assumed risk because the petitioner failed to plead and/or prove that Anelich knew of the defective condition of the clutch and appreciated the danger thereof.

(3) Even if the defendants had pleaded and proved that the defective appliance complained of, was known to and fully appreciated by Anelich, under the Maritime law and the Jones Act he would not have assumed the risk thereof.

Evidence of Negligence, As a Matter of Law

1. The lower Court correctly held that there was ample evidence from which the jury could find that the injury and resulting death was due to the defective appliance and acts of negligence of the defendants. The following acts of negligence were clearly proven:

(a) Defective appliances; worn clutch and lock thereon.

(b) Failure of the Owner personally and members of the Crew to disengage the clutch in time to avoid injury.

(c) Failure of the owner and crew to render first aid at the time of accident.

(d) Having an engineer who did not understand the Slavonian language, and delay by the engineer in stopping the engine.

(e) Failure to send any member of the crew with the injured man.

(f) Failure to put into nearest port, and in not adopting fastest available mode of travel to medical aid.

(g) In telling Coast Guard that there was "a man hurt" instead of stating that his leg was practically torn off.

V.

Argument

Throughout petitioners' brief, it is argued that Anelich was not a seaman, in the true sense, under the Jones Act, whereas in fact and in law he was a seaman in every sense.

Warner v. Goltra, 55 Sup Ct. 46;

Domandich v. Doratich, 5 Pac. (2) 310, 165 Wash. 314;

Langness v. Green, 282 U. S. 532, 32 P (2) 565, 32 F (2) 284.

Assumption of Risk, First Branch

The only plea relating to assumption of risks found in the petitioner's answer is that relating to "RISKS NATURALLY INCIDENT TO THE DECEASED'S EMPLOYMENT" (R 10).

The burden was upon the defendants to prove their defense of assumption of risk, and there was no proof whatsoever that Anelich was injured by ORDINARY OR NATURAL RISKS.

Stevens v. O'Brien, 62 F (2) 632 (CCA 5).

There was, therefore, a total failure of proof on this branch of the defense, and no issue on the question to be submitted to the jury.

At the trial the plaintiff's case was rested solely upon two charges of negligence,

(1st) the negligence of the owner of the vessel in furnishing defective appliances, and

(2nd) a single unforseen act of negligence on the part of the owner, personally, in failing to stop the winch and thereby save Anelich from injury.

These two charges of negligence were proved by an abundance of evidence, and both of them constituted EXTRA-ORDINARY risks, which were not assumed by Anelich under the Maritime law as enlarged by the Jones Act.

Throughout their brief the petitioners argue that Anelich was injured by ORDINARY RISKS incidental to his employment, and that the defense of assumed risk was denied to them by the courts below. The petitioners also seem to argue that the courts below erred in not holding, as a matter of law, that Anelich assumed the risks of his employment, regardless of whether these risks were Ordinary risks naturally incidentaly to the employment, or whether they resulted

from the negligence of the owner of the vessel as charged in the complaint, which were EXTRA-ORDINARY risks.

There was ample evidence from which the jury was warranted in believing (1) that the clutch was so worn and defective that it would not stay in mesh without the aid of the stick or lock, and (2) that the owner of the boat was standing within reach of the clutch lever, when Anelich became entangled in the line, and (if the clutch had not been locked) he could easily have disengaged the clutch, but negligently failed to do so.

In the light of this evidence the courts below did not err in holding, as a matter of law, that Anelich did not assume the risk of this negligence.

Chicago R. I. Co. v. Ward, 252 U. S. 19;

Reed v. Director of Railways, 258 U. S. 92;

Ranstrom v. International Stevedoring Co., 277 P. 992, 152 Wash. 332;

Tenneson v. Kadiak Fisheries, 2 P (2) 745, 164 Wash. 380.

The Jones Act expresly provides that a seaman does not assume the risk of a single act of negligence on the part of a fellow servant. He certainly would not assume the risk of the owner's personal negligence.

Warner v. Goltra, 55 Sup. Ct. 46; 46 U. S. C. A., Sec. 688;

Rasmussen v. Twin Harbor Co., 265 P 1085, 147 Wash. 260.

Assumption of Risk, Second Branch

This branch is based upon the fact that the owner negligently furnished defective appliances.

Before this branch of the doctrine could have become an issue in the case, it was incumbent upon the defendants to plead and prove, that the danger of the defective clutch was voluntarily assumed by Anelich, that is to say, that he was aware of and appreciated the danger; this the petitioners failed to do.

Chesapeake & Ohio Ry. v. Winder, 23 F (2) 794;

C. & O. Ry. v. Proffitt, 241 U. S. 462.

> "But if it was an unusual and extraordinary danger, plaintiff could not be held to have assumed it, in the absence of knowledge or notice on his part. To subject an employee without warning to unusual dangers not normally incident to the employment, is in itself an act of negligence."

This statement refers to a shore servant, and as we shall presently show, the rule with reference to seamen is even more liberal; a seaman does not assume the risk of defective appliances, even though he knew of the defect.

There was not a scintilla of evidence that Anelich ever examined this clutch; that he knew its worn con-

dition; that he ever used the stick or lock, or that he appreciated the danger.

With this condition of the record the defendants requested instruction No. 7 (R 12) on the question of assumption of risk.

This instruction was properly refused because there was no evidence from which the jury could have found that Anelich knew of the worn condition of the clutch, and even if he had known, under the maritime law he could not be held to have assumed the risk of a defective appliance, that clearly rendered the vessel unseaworthy.

The instruction would have confused, rather than aided the jury as it would have misled the jury in believing that under the law, as defined in the instruction, a defective appliance and/or an unseaworthy vessel, and the negligence of the owner in failing to shut off the winch, were all ordinary risks incident to the employment, and assumed by Anelich.

Assumption of Risk, as Applied to Seamen, Is not the Same as at Common Law

Petitioners argue that the strict rules of the common law, with reference to assumption of risk, apply to seamen, since the Jones Act.

Before this proposition can be argued, we must as-

sume (without admitting) that there was some evidence from which the jury could have found that Anelich knew and appreciated the danger of the defective appliance.

If this action had been brought, by the seaman, prior to the Jones Act, it could not be denied that the vessel was unseaworthy, for lack of appliances, and the seaman would have been entitled to an indemnity even though he knew of the defect.

The Osceola, 189 U. S. 158

> "That the vessel and her owners are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the *proper appliances* appurtenant to the ship."

By the Jones Act, Congress clearly intended to enlarge the rights of seamen, and their personal represntatives, rather than to restrict them.

The latest expression of this Court is found in *Warner v. Goltra*, 55 Sup. Ct. 46:

> "In the enforcement of the statute a policy of liberal construction announced at the beginning has been steadily maintained. Early in the history of the act, the question came up whether it gave a remedy to stevedores. We decided that it did. 'It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen.' *Interna-*

tional Stevedoring Co. v. Haverty, 272 U. S. 50, 52, 47 S. Ct. 19, 17 L. Ed. 157. None the less, verbal niceties were bent to the overmastering purpose of the act to give protection to workers injured upon ships. 'words,' we said 'are flexible' *****

"In a broad sense, a seaman is a mariner of any degree, one who lives his life upon the sea. It is enough that what he does effects 'the operation and welfare of the ship when she is upon a voyage' *****

"Our concern is to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained. Congress knew that men employed upon a ship were without a remedy in damages for negligence beyond their cure and maintenance, *unless the injury was a consequence of the unseaworthiness of the ship or a defect in her equipment* *****.

"The old measure of recovery was the same for all aboard, the highest and the lowest. The new measure was not designed to narrow the protected class while broadening the damages. We stick too closely to the letter if we say that Congress had the will to give damages for wounds or death to the crew at large or their dependents and to leave the master and his dependants out. An ancient evil was to be uprooted, and uprooted together. It was not to be left with fibers still clinging to the soil. ****

"*In respect of dealings of that order, the maritime law by inveterate tradition has made the ordinary seaman a member of a favored class. He is a 'ward of the admiralty', often ignorant and help-*

less, and so in need of protection against himself as well as others. ****" (Italics ours)

In *Cortes v. Baltimore Insular Line*, 297 U. S. 367, this Court said:

"We are warned, however, that in giving this contention to the statute (holding that failure to give medical attention is a personal injury) we are omitting to give head to its reference to the act regulating the remedies of railroad employees, and are ignoring the standards of duty thus carried over and adopted . . . True indeed it is that a common carrier by land is not subject to a duty, except in special circumstances, to give maintenance of cure to sick or disabled employees . . . *We do not read the act for the relief of seamen as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability upon carriers by water. The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. This Court has said that 'the ancient characterization of seamen as wards of Admiralty is even more accurate now than it was formerly' Robertson v. Baldwin*, 165 U. S. 287. *Another Court has said: "The masters authority is quite despotic and sometimes rougly exercised and the conveniences of a ship out upon the ocean are necessarily limited.' Scarff v. Metcalf*, 107 N. Y. 211, 215, 13 N. E. 796. *Out of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection.* Congress did not mean THAT THE STANDARDS OF LEGAL DUTY MUST BE THE SAME BY LAND AND SEA." (Italics ours)

It is clear from the above statement that this Court has adopted the view that the standards of legal duty as to seamen and land servants are entirely different; that the strict rules of the common law with reference to legal burdens do not apply to seamen.

The Jones Act did not deprive the seamen of any right he had under maritime Law. It gave him greater protection. It is therefore still the Law that a seamen does not assume the risk of defective appliances, although known to him, nor does he assume the risk of a single act of negligence of a fellow servant, or the owner, which negligence he could not have foreseen.

In *Johnson v. Panama Ry Co.*, 264 U. S. 375 this Court affirmed the judgment of the 2nd Circuit where that Court (289 F. 964) held as follows:

> "The maritime law imposed upon the ship owner the risk incident to the use of defective and dangerous APPLIANCES, and we see nothing in the NEW LEGISLATION WHICH CHANGES THE LAW IN THIS REGARD . . . What the law previously was is stated by this Court in *Cricket v. Parry* (CCA) 263 F. 523, in which we held that a ship owner cannot avoid liability for injury to a *seaman* by a defective and dangerous appliance on the ground that the seamen KNEW OF THE DEFECT, when he slipped. We declared . . . if a ship owner supplied defective . . . appliance . . . he did so at his own risk and not at the risk of a seaman."

To the same effect are the following:

In Re Luckenback S. S. Co. 16 Fed. (2) 168;

Cricket SS. Co. v. Parry, 263 F. (CCA 2) 523;

Hansen v. U. S., 12 F. (2) 321;

Grimberg v. Admiral Oriental SS., 300 Fed. 619 (Wash);

Storgard v. France Co., 263 Fed. 545 (CCA);

States SS. Co. v. Berglann, 41 F. (2) 456 (CCA 9th);

The Calvert, 51 F. (2) 494 (CCA 4th);

Henry Gillen's Cons v. Fernald, 294 F. 520 (CCA 2d);

Howarth v. U. S., 24 F. (2) 374 (CCA 2);

Ives v. U. S., 58 F. (2) 201 (CCA 2);

Grace & Co. v. Skaanes, 4 F. (2) 106 (CCA 9th);

Grant v. U. S. Shipping Board, 22 F. (2) 488;

The Waco, 3 F. (2) 476;

Zinnell v. U. S. Shipping Board, 10 F. (2) 47 (CCA).

On Page 31 of petitioner's brief a number of cases are cited in support of the assertion that a majority of the Courts have held that seamen assume the risk of injuries received from defective appliances. The cases cited merely hold that the doctrine of assumption of risk, as to ORDINARY and NATURAL risks, applies to seaman; but with reference to EXTRA-ORDINARY risks some of them hold that seamen do not assume

these risks even though known, and others either hold, or state the rule, that seamen do not assume the risks of defective appliances unless known and appreciated. We invite the court to read these cases for they are the very basis of petitioner's contentions in this case.

Petitioners admit that when a seaman is under any sort of orders he does not assume the risk of defective appliances. We submit that it would be almost impossible for this court or any court to state what is, and what is not, an order; it might well be argued that Anelich was under orders, for the master and the owner were within a few feet of him directing his work. (R. 197)

Evidence of Negligence

The 2nd, 3rd and 4th reasons for the allowance of the writ on Page 5 of petitioner's brief all involve questions of fact, which were submitted to the jury on substantial evidence and resolved in favor of the respondent.

In *Gunning v. Cooley*, 281 U. S. 90, where there was a question as to whether or not the plaintiff had proved negligence of a doctor in treating the plaintiff's ear, this court said:

"Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a preemptory instrution, the Court assumes that the evidence for the opposing

party proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deductible from them. (cases cited) Where uncertainty as to the existence of negligence arises from a conflict in the testimony . . . the question is not one of law but of fact to be settled by the jury."

The arguments advanced by the petitioners are conclusively answered by the Supreme Court of Washington in the opinion (R. 22 to 24) with an appropriate citation of authority.

See also *Cortes v. Baltimore Insular Line*, 287 U. S. 367. .

VI.
Conclusion

In conclusion we respectfully submit that *certiorari* should be denied in this case for the following reasons:

1. That the questions sought to be raised by the petition herein involve nothing but questions of fact.

2. That under the evidence the jury was warranted in finding that the injury proximately resulted from the personal negligence of the owner in failing to disengage the clutch when he saw that Anelich had become entangled in the line. If this is true, Anelich could not have assumed the risk.

3. Even under the rule of assumed risk as applicable to shore workers, there was a total failure of proof

of knowledge of the defective winch.

4. That the rulings of the Courts below are in harmony with the uniform holdings of the Admiralty Courts.

5. That under the uniform holdings of the several circuits, which have passed upon the question of law sought to be raised by the petitioners, a seaman does not assume the risk of an unseaworthy vessel, or of defective appliances, even though the defects and dangers are known to him. This is precisely the holding of the Supreme Court of the State of Washington.

We respectfully submit that the only questions in this case are questions of fact, and that no reason for the issuance of the Writ has been disclosed by the petition herein, and that the same should be denied.

Respectfully submitted,

WILBUR ZUNDEL, and
SAMUEL B. BASSETT,
Counsel for Respondent.

January 23, 1936.